81-2316

Supreme Court, U.S.
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In the

Supreme Court of the United States

No. ____

OCTOBER TERM, 1981

The Board of Education of the North Little Rock, Arkansas, School District, George E. Miller, Superintendent, and George Stancil, President,

Petitioners,

VS.

Robert J. Davis and Lorene Joshua,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

I. Can the jurisdiction of a district court to supervise the operation of a school district be perpetuated by the summary grant of an application to intervene by a new plaintiff after the case has become moot as to the original plaintiffs because none of them continue to have a stake in its outcome?

II. Does the Constitution vest a district court with jurisdiction to continue its supervision of a school district's operations, including a continued imposition of a mandatory cross-district busing and manipulation of school assignments to achieve racial balance, where the district has operated a court-approved racially unitary school system since 1972?

LIST OF PARTIES

The parties in the Court of Appeals are those shown in the caption.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported as *Davis v. Board of Education of the North Little Rock, School District*, 674 F.2d 684 (8th Cir. 1982) and appears in the Appendix herein, p. A-1. The order of the United States District Court for the Eastern District of Arkansas of August 7 and August 17, 1981 are reported at *Davis v. Board of Education of the North Little Rock, Arkansas, School District*, 520 F.Supp. 108 (E.D. Ark. 1981) and appear in the Appendix herein. The Judgment of the Court of Appeals is set forth in the Appendix, p. A-__.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1). The judgment of the United States Court of Appeals for the Eighth Circuit was entered March 23, 1982.

CONSTITUTIONAL PROVISIONS AND RULES INVOLVED

This case involves the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and Section 2 of Article III of the Constitution of the United States. Also involved are Rules 23 and 24 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

Petitioners last sought this Court's review in *Davis v. Board of Education*, 50 U.S.L.W. 3272 (1981). Certiorari was denied.

This school desegregation case was brought in 1968 pursuant the provisions of 42 U.S.C. §1983 seeking the desegregation of the North Little Rock School District. While never certified as a class action pursuant Rule 23, F.R.Civ.P., it was utilized as a vehicle by the district court, Hon. J. Smith Henley, to superintend desegregation of the school district. Under orders of the district court, ultimately reviewed and approved by the Court of Appeals with minor modifications (*Davis v. Board of Ed. of North Little Rock, Arkansas, School District*, 449 F.2d 500 (8th Cir. 1971), a racially unitary school system was achieved in September, 1972.

In 1975 petitioners applied to the district court, as they were required to do by the 1971 opinion of the Court of Appeals, for approval of proposed school construction. Another such application was made in 1976 at which time it was discovered that the court had not formally approved the 1975 application. Petitioners' motions of both 1975 and 1976 also sought dismissal of this litigation on grounds that this school system had been "unitary" since September, 1972, petitioners had fully discharged their constitutional obligations, and therefore there was no basis for continued jurisdiction of the district court.

Further proceedings followed, partially reviewed in *Davis v. Board of Ed. of North Little Rock, Arkansas, School District*, 635 F.2d 730 (8th Cir. 1980), which included an Order of the district court announced at pre-trial conference on April 22, 1977 allowing intervention of a new party plaintiff (Mrs. Joshua) over objections of petitioners to replace the incumbent plaintiff (Mr. Davis) who had moved out of the school district with his family more than a year earlier.

A three-day trial followed before Judge Shell who entered a Memorandum Opinion and Order on Sptember 13, 1977 purporting to dispose of the issues that had been presented but not dealing with petitioners' objections respecting jurisdiction based on lack of a plaintiff with standing to assert a case or controversy under Article III. Timely motions to revise that Opinion and Order were filed under Rules 52 and 29, F.R.Civ.P.

Judge Shell took no further substantive action in the case prior to his death in June, 1978. Ultimately, on June 29, 1979, Judge Roy to whom the case has been assigned entered an order declining to consider the motion of petitioners seeking amendment of Judge Shell's September 13, 1977 order. The Court of Appeals affirmed the district court in all respects on appeal from Judge Roy's order. *Davis v. Board of Education of the North Little Rock, Arkansas, School District*, 635 F.2d 730 (8th Cir. 1980). However, it did not address in its opinion petitioners' Article III arguments relating to mootness and lack of any plaintiff with standing to continue prosecution of the case. This Court denied certiorari, Justice Rehnquist filing a dissenting opinion supporting the grant of review on essentially the same question as is now presented under Question Presented No. I. 50 U.S.L.W. 3272 (1981).

On May 22, 1981 petitioners sought, as still required by the Court of Appeals' 1971 decision, approval of the district court to close a school facility. This was opposed by counsel for Mrs. Joshua who had been permitted to intervene in 1977. A trial on the merits before Judge Woods, to whom the case had been reassigned, resulted in approval of petitioners' application. For the first time in this protracted litigation the district court acknowledged that "serious questions have been raised as to intervenor's standing."

The Court of Appeals affirmed. *Davis v. Board of Education of the North Little Rock, Arkansas, School*

District, 674 F.2d 684 (8th Cir. 1981). This time it did address briefly petitioners' arguments of lack of an Article III case or controversy, and rejected them.

Review is now sought on the determination, or assumption, of continued jurisdiction by the courts below of this case which by standards clearly articulated by this Court has been moot for several years.

REASONS FOR GRANTING THE WRIT

The decisions of the courts below so far depart from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision in that the district court did no more than acknowledge petitioners' claim that this case is moot and the Court of Appeals summarily disposed of this claim on the ground that it had previously instructed the district court to retain jurisdiction. Moreover, the decisions of the courts below rest on the implicit assumption that the jurisdiction of a district court in a school desegregation case continues so long as any lawyer or person seeking to be made a party makes a racially-oriented complaint about the operation of the school system. This is contrary to the applicable decisions of this Court and is in conflict with those of other courts of appeals.

I.

CAN THE JURISDICTION OF A DISTRICT COURT TO SUPERVISE THE OPERATION OF A SCHOOL DISTRICT BE PERPETUATED BY THE SUMMARY GRANT OF AN APPLICATION TO INTERVENE BY A NEW PLAINTIFF AFTER THE CASE HAS BECOME MOOT AS TO THE ORIGINAL PLAINTIFFS BECAUSE NONE OF THEM CONTINUE TO HAVE A STAKE IN ITS OUTCOME?

The case became moot and the district judge so apprised before he undertook the three-day trial in 1977. The suit was originally brought by Mr. Graves on behalf of his minor children attending petitioners' schools. Prior to reaching the Court of Appeals in 1971 Mr. Davis was substituted as plaintiff on behalf of his children attending these schools because the Graves children were no longer in the school system. On April 21, 1977 petitioners filed a motion to dismiss asserting that during the course of his deposition on the day before Mr. Davis disclosed that he had moved his residence out of the North Little Rock School District about January 1, 1976, that his minor children had withdrawn from the schools of the district about that date, and none of them thereafter had connection with the school district.

Counsel for respondents sought to cure this jurisdictional defect by filing an application for intervention by Mrs. Joshua on behalf of her children on April 20, 1977. Over objection of petitioners Judge Shell ruled in a pre-trial conference on April 22, 1977, not attending by a court reporter, that he would grant this application and deny the motion to dismiss. In response to the request of petitioners' counsel he confirmed this ruling at the commencement of the trial on April 25, 1977.

Even if the court's jurisdiction at the time had been unquestioned, the intervention clearly was untimely under Rule 24, F.R.Civ.P. [1] However, it was vigorously urged that jurisdiction had abated both because of the District's unitary status for five years and because the case had become moot. The district court brushed aside both objections summarily. Thus Mrs. Joshua was permitted to

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[1] This well-publicized suit had been pending since 1968 and Mrs. Joshua did not alleged lack of knowledge of its pendency to excuse delay in seeking intervention. See *NAACP v. New York*, 413 U.S. 345 (1973). Intervention was not intended as a vehicle to revive stale and abated litigation.

keep afloat a non-certified class action simply on the assertion in her application that she sought to represent "members of the class purportedly represented by Robert J. Davis, et al."

On appeal from Judge Shell's order the Court of Appeals simply ignored the claim of mootness. *Davis v. North Little Rock, Arkansas, School District*, 536 F.2d 730 (8th Cir. 1980), for which it was criticized by Justice Rehnquist in his dissent from the denial of certiorari. 50 U.S.L.W. 3272 (1981). In the most recent proceedings before the district court it did, for the first time, acknowledge that the challenge to intervenor's standing raised "serious questions" but resolved them in favor of jurisdiction without any discussion of the principle of mootness or its Article III implications. (A. ____)

This time the Court of Appeals devotes the last two paragraphs of its opinion to the Article III challenge. *Davis v. Board of Education*, 674 F.2d 684, 689 (8th Cir. 1982). It is rejected on the grounds that it (the Court of Appeals) has directed the district court "to maintain jurisdiction until full integration is achieved" and that petitioners have recognized the continuing authority of the district court in the matter by repeated applications to it for approval of administrative decisions relative to the operation of the school system. These applications were required by the prior orders of the courts below, especially that of the Court of Appeals in 1971, and obedience to such judicial mandates hardly can be regarded as admitting the jurisdiction to issue them.

The constitutional requirement that jurisdiction of the federal courts is confined to a justiciable controversy *between the parties* is perverted by the courts below by the artifice of essentially ignoring petitioners' arguments on the issue which they have advanced for now over five years. This is illustrated by the testimony of counsel for intervenor, called to testify at the most recent hearing

before Judge Woods on the issues of standing and mootness, who responded to a question designed to show that no motion had ever been made in this case for certification under Rule 23:

> "Just recently in the brief to the Court of Appeals, Mr. Light, you indicated that the question of standing had not been addressed in the past and the Court of Appeals ignored you, went ahead and ruled that the Court has to maintain jurisdiction of the matter, and your point of view with respect to standing was therefore rejected." (T. 14)

The applicable standards were clear enough when the district court made its decision in 1977. The intervention of the United States in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976) before answer was filed is all that saved the case from being dismissed as clearly moot, and the Court's assessment of the status of the other plaintiffs is squarely applicable here:

> "But these arguments overlook the fact that the named parties whom counsel originally undertook to represent in this litigation no longer have any stake in its outcome. As to them the case is clearly moot. *And while counsel may wish to represent a class of unnamed individuals still attending the Pasadena Public Schools who do have some substantial interest in the outcome of this litigation, there has been no certification of any such class which is or was represented by a named party to this litigation.*" (Emphasis added) 427 U.S. 424, 430.

The course adopted by the district court also disregarded the teachings of *Sosna v. Iowa*, 419 U.S. 393 (1975) where certification pursuant Rule 23 by the district court while the named plaintiff had standing (a status lost while the case was on appeal) saved the case from abating as moot, and *Indianapolis School Commissioners v. Jacobs*, 420 U.S. 128 (1975) where such a loss of standing resulted in vacating the

judgments of the lower courts and dismissal of the complaint because, as in the case at bar, there was no such certification.

In the context here presented the interrelated questions of standing and mootness have constitutional dimensions. *Warth v. Seldin*, 422 U.S. 490 (1975); *Valley Forge Christian College v. Americans United for Separation of Church and State*, ____ U.S. ____, 70 L.Ed.2d 700 (1982). However, the courts below refused to recognize them.

Petitioners invoke this Court's supervisory power to remedy disposition by the courts below of meritorious jurisdiction defenses by esssentially ignoring them. Since this is the only remedy afforded in our system for such error it is respectfully urged that the fundamental considerations of justice and due process command the granting of review.

II.

DOES THE CONSTITUTION VEST A DISTRICT COURT WITH JURISDICTION TO CONTINUE ITS SUPERVISION OF A SCHOOL DISTRICT'S OPERATIONS, INCLUDING A CONTINUED IMPOSITION OF A MANDATORY CROSS-DISTRICT BUSING AND MANIPULATION OF SCHOOL ASSIGNMENTS TO ACHIEVE RACIAL BALANCE, WHERE THE DISTRICT HAS OPERATED A COURT-APPROVED RACIALLY UNITARY SCHOOL SYSTEM SINCE 1972?

A basic principle in our jurisprudence is that "Public policy dictates that there be an end of litigation;" *Baldwin v. Iowa State Traveling Men's Asso.*, 283 U.S. 522, 525 (1931). When the district courts should return the management of the schools to local authorities pursuant this principle remains an unsettled question.

This Court said in *Brown v. Board of Education*, 349 U.S. 294, 301 (1955):

> "During this period of transition, the courts will retain jurisdiction of these cases."

Subsequent amplifications of that mandate have not provided the lower federal courts the guidance essential to fashion a uniform rule in this matter of critical national concern. In *Green v. School Board of New Kent County*, 391 U.S. 430, 439 (1968) it was said:

> " * * * the court should retain jurisdiction until it is clear that state-imposed segregation has been completely removed."

A similar observation was made on the same day in *Raney v. Board of Education*, 391 U.S. 443, 449 (1968). But it was suggested in *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 23 (1971) that "once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated" there was no longer a constitutional violation to support continued jurisdiction in the district court. This concept was articulated in *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976) in these terms:

> "For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns."

In the case at bar the district court has refused to dismiss although it had found as early as 1973 that "satisfactory racial integration of all twelve grades of the

North Little Rock School System and of staff and faculty has been achieved" [2] and respondents had conceded in 1975 that this school district has been operating a "unitary system". [3] The grievances that the district court allowed respondents to inject in the 1977 trial did not challenge the desegregation plan which had long had that court's approval, but dealt with dissatisfaction of some individuals concerning the manner in which the operation of the plan affected them or others for whom they undertook to speak.

This is in contrast to the well reasoned, and unappealed, decision in *United States v. Corinth Municipal Separate School District*, 414 F. Supp. 1336 (N.D. Miss. 1976) where the suit was dismissed notwithstanding claims of racial discrimination not directed toward the plan itself. The court viewed these claims as advanced "to serve as a vehicle by which the total operation of the public schools in that district may be held interminably subject to federal court jurisdiction." It concluded:

> "Here, we believe that, as a federal court, we have no further constitutional function to perform in this school system. The journey of the Corinth school district from *Brown I* to *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 91 S.Ct. 1267, 28 L.Ed.2d 554 (1971), has been successfully completed. Since this is so, the words of Chief Justice Burger, speaking for a unanimous court, are appropriate:
>
> > 'At some point, these school authorities and others like them should have achieved full compliance with this Court's decision in *Brown I*. The systems would then be "unitary" in the sense required by our decisions in *Green (Green v. County School*

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[2] *Davis v. Board of Education*, 362 F. Supp. 730 (E.D. Ark. 1973).

[3] Motion of plaintiffs filed April 30, 1975.

Board, 391 U.S. 430, 88 S.Ct. 1689, 20 L.Ed.2d 716) and *Alexander*[*Alexander v. Holmes County Board of Education*, 396 U.S. 19, 90 S.Ct. 29, 24 L.Ed.2d 19).' "

The conflicting views of these two district courts are reflected in those of the courts of appeals attempting to deal with this recurring issue. The Fifth Circuit adopted the rule that the district courts should retain jurisdiction for a "reasonable time" after finding a school system to be unitary in order to insure that the state imposed segregation has been completely removed. *Bradley v. Board of Public Instruction of Pinellas County, Florida*, 431 F.2d 1377 (5th Cir. 1970); *Davis v. Board of School Commissioners of Mobile County*, 430 F.2d 883 (5th Cir. 1970); *Mannings v. Board of Public Instruction of Hillsborough County, Florida*, 427 F.2d 874 (5th Cir. 1970). Later decisions in that circuit hold that the district courts should relinquish jurisdiction three years after finding a system to be unitary if it has continued to meet that standard.[4]

Other circuits have held that jurisdiction should be retained until "disestablishment" of the dual school system has been achieved. *Morgan v. Kerrigan*, 523 F.2d 917 (1st Cir. 1975); *Evans v. Buchanan*, 582 F.2d 750 (3rd Cir. 1978); *Sloan v. Tenth School District of Wilson County, Tennessee*, 433 F.2d 587 (6th Cir. 1970).

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[4] *United States v. Texas*, 509 F.2d 192 (5th Cir. 1975); *United States v. Texas Education Agency*, 467 F.2d 848 (5th Cir. 1972); *Cisnero v. Corpus Christi Independent School District*, 467 F.2d 142 (5th Cir. 1972); *Calhoun v. Cook*, 451 F.2d 583 (5th Cir. 1971); *Youngblood v. Board of Public Instruction of Bay County, Florida*, 448 F.2d 770 (5th Cir. 1971); *Steele v. Board of Leon County, Florida*, 448 F.2d 767 (5th Cir. 1971); *Wright v. Board of Public Instruction of Alachua County, Florida*, 445 F.2d 1397 (5th Cir. 1971); *Lemon v. Bossier Parish School Board*, 444 F.2d 1400 (5th Cir. 1971).

Still a different standard has been adopted in the Fourth and Eighth Circuits which require that jurisdiction be retained, apparently in perpetuity, to insure that the approved plan "is operated in a constitutionally permissible fashion". *Kelley v. Altheimer, Arkansas Public School District*, 378 F.2d 483 (8th Cir. 1967); *Haney v. County Board of Education*, 429 F.2d 364 (8th Cir. 1970); *Felder v. Harnett County Board of Education*, 409 F.2d 1070 (4th Cir. 1969).

The requirement of the Court of Appeals in the case at bar that the district court "retain jurisdiction until such time as the North Little Rock School District is thoroughly integrated" (635 F.2d 730, 733) and "until such time as the district court determines that a unitary system of education has been achieved and the North Little Rock School District is thoroughly integrated" (674 F.2d 684, 689) fall in the latter class of decisions.

The difference in the foregoing rules is one of substance. One group of rules relinquishes control of the school system that has attained unitary status to the local authorities who are best equipped to deal with the day by day management of the schools including resolution in the first instance of questions that inevitably arise with legal implications. The courts below have elected a rule that transfers to the federal judiciary supervision of the schools with no intelligible standard by which that intervention ever can be terminated.

CONCLUSION

For the foregoing reasons it is submitted that the petition for certiorari should be granted to review the decision and judgment of the United States Court of Appeals for the Eighth Circuit on the two questions presented.

Respectfully submitted,

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June 18, 1982

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 81-1875

Robert J. Davis, Carnell Graves, Richard J. Graves, Vickie Ann Graves, Meredith D. Graves, Debra M. Graves and Kevin R. Graves, minors, by their father and next friend, Floyd Graves and Lorene Joshua,	•	
Appellants,	•	Appeal from the United States District Court for the Eastern District of Arkansas
v.	•	
Board of Education of the North Little Rock, Arkansas, School District, a public body corporate, and F.B. Wright, Superintendent of Schools of the North Little Rock School District,	•	
Appellees.	•	

Submitted: January 14, 1982
Filed: March 23, 1982

Before BRIGHT, ROSS and STEPHENSON, Circuit Judges.

STEPHENSON, Circuit Judge.

The Board of Education of the North Little Rock School District sought permission from the district court to revise

its desegregation plan. The Board wished to close one of its schools in order to ease administrative problems caused by declining enrollment and decreased funding. This motion was opposed on the grounds that it would place a disproportionate transportation burden on black students and because it would mean the closing of the only junior high in a black neighborhood. The district court [1] approved the proposed closing. We affirm.

I. PROCEDURAL OVERVIEW

The original complaint in the North Little Rock school desegregation case was filed in August 1968. Since that time, there has been ongoing litigation concerning, first, the nature of the desegregation plan to be adopted and, second, whether the plan has been faithfully implemented by the District and what revisions the District may properly install. *See Graves v. Board of Education*, 299 F. Supp. 843 (E.D. Ark. 1969); Graves v. Board of Education, 302 F.Supp. 136 (E.D. Ark. 1969); *Davis v. Board of Education*, 328 F.Supp. 1197 (E.D. Ark. 1971); *modified on appeal*, 449 F.2d 500 (8th Cir. 1971) (en banc); *Davis v. Board of Education*, 362 F.Supp. 730 (E.D. Ark. 1973); *Davis v. Board of Education*, 635 F.2d 730 (8th Cir. 1980), *cert denied*, 50 U.S.L.W. 3272 (1981).

This is the third time that this suit has been before this court. On the first occasion our en banc court approved the desegregation plan adopted by the district court. The opinion clearly envisaged that on remand the district court was to retain jurisdiction. *Davis v. Board of Education*, *supra*, 449 F.2d at 502. In this case's second trip to the court of appeals this court determined that certain changes in student transportation and in employment, assignment and dismissal of faculty and staff were required. Again, the district court was instructed to retain jurisdiction until such

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[1] The Honorable Henry Woods, United States District Judge for the Eastern District of Arkansas, presiding.

time as the North Little Rock School District is thoroughly integrated. *Davis v. Board of Education, supra*, 635 F.2d at 733.

In May 1981, defendant Board of Education filed the motion which led to this appeal. The Board sought approval to close the present seventh grade center which was housed in the building known as the Jones School. The motion and an accompanying document stated that enrollment in the seventh, eighth and ninth grades had declined 781 students, from 3170 in 1971, when the desegregation plan was imposed, to 2389 students for the 1980-81 school year. The motion maintained that the closing of the Jones School was educationally sound because of the decline in enrollment and economically prudent because reductions in federal and state aid had forced the Board to reduce its budget by approxiately $1 million.

The intervenor-plaintiff resisted this motion and asserted, in relevant part, that (1) the proposed closing would materially alter the desegregation plan "in that it will further burden black children who are already disproportionately burdened insofar as transportation is concerned," (2) the closing of the Jones School represented the School Board's "bad faith" in the way it had conducted desegregation in North Little Rock. Essentially, the plaintiff asserts that the school was adequate prior to desegregation and that the Board had an obligation to adequately maintain the Jones School.

A one-day hearing on the motion was held. George Miller, Superintendent of Schools; Andrew Power, Assistant Superintendent and George Stancil, President of the Board of Education, all testified in support of the motion. Power and Stancil are black. The appellants produced only one witness, plaintiff-intervenor Lorene Joshua. Joshua only gave testimony concerning her legal standing in this case. Following the hearing, the district court concluded:

> The testimony of the movants amply supported their position that the District is faced with a budget reduction of $1,150,000; that the closing of Central would save the district approximately $340,000; that the Poplar Street facility is a more desirable site from the standpoint of physical facilities and location, and that it would require less maintenance and security costs. While it is true that slightly more blacks than whites (120 against 93) would be bused under the proposed plan than were bused in the 1980-81 school year, we do not regard these figures as significant or unduly impacting upon the black children.

This appeal followed. A stay pending appeal was denied.

II. FACTUAL BACKGROUND

The decision to close the Jones School affects the students in grades seven, eight and nine. The "Storm" plan, *see Davis v. Board of Education*, *supra*, 449 F.2d at 501, n.2, utilized five separate buildings to handle these three grades. Central Junior High, formerly located in the building known as the Jones School, was the seventh grade center. The seventh grade center was the school for all the seventh graders in the North Little Rock School District. Four other schools (Poplar Street, Ridge Road, Lakewood and Rose City) served the students in eighth and ninth grades. The Board's proposal closed the Jones School, shifted the seventh graders to the Poplar Street school and used the remaining three schools for eighth and ninth grade students.

The Jones School was located in the Dixie Addition of North Little Rock. It was the only junior high building in a black neighborhood.[2] The main building of the Jones School was built in 1952. The gymnasium was built in the early 60s. The Jones School consists of three other

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[2] Judge Shell described the geographical framework of the desegregation plan as follows:

buildings. Two were built with used lumber. The third is a "real old" elementary school.

A brief explanation of the operation of the Storm Plan at the secondary level is required. Utilizing a very simplified approach, the city of North Little Rock can be graphically viewed as a rectangle. Along the southern border the Arkansas River runs in an easterly direction, separating the city of Little Rock from North Little Rock. Interstate Highway 40 bisects the rectangle, running along an east-west line roughly parallel to the Arkansas River. Interstate Highway 30 intersects, but does not cross, Interstate Highway 40 at a point which, for the purposes of this description, can be considered the geographical center of the city. Interstate 30 leads south from Interstate 40 and crosses the Arkansas River into Little Rock. Most of the black population of North Little Rock live in the southern half of the city between the Arkansas River and I-40. The Dixie Addition is located to the south of Interstate 40 and to the east of Interstate 30.

The geographical attendance zones for the two high schools maintained by the district are defined by a north-south line bisecting the city into eastern and western divisions. Interstate 30 serves as the divider between these two zones in the southern half of the city. Ole Main High School (formerly known as North Little Rock High) is centrally located south of I-40 and west of I-30, a short distance from their intersection. Northeast High School, as the name implies, is located north of I-40 and east of I-30. It is not considered centrally located. Lakewood Junior High shares a campus with Northeast High School.

Prior to 1969 the school district maintained the Scipio A. Jones High School in the Dixie Addition. Jones High was attended by black students only. With the advent of the Storm Plan, Jones was converted to a school for all seventh grade students in the district and renamed Central Junior High, commonly referred to as the seventh grade center.

Davis v. Board of Educ., slip op. at 3-4, No. LR-68-C-151 (E.D. Ark., Sept. 13, 1977).

The Poplar Street School is north and west of Jones but is still centrally located.[3] It is in a racially mixed neighborhood. Poplar Street was built shortly after World War II.

The three remaining junior high buildings are near the outer boundaries of the school district and could not be classified as centrally located.

The School Board's evidence indicated that it considered closing each of the five schools when it was clear that one school would have to be eliminated. However, they only seriously evaluated the consequences of closing the Jones or the Poplar Street schools. The list was limited to these two schools, according to the officials' testimony, because the Board and the administration believed a central location was vital for a school which all the seventh graders in the district would attend.

A study submitted to the School Board reported that the annual cost of operating and maintaining the Jones School was significantly higher than that incurred at Poplar Street. The cost to run Poplar Street was about $70,000 while the Jones School operation expense was approximately $120,000.[4] The study also stated that "needed repairs within five years" at Jones would cost about $2.1 million while at Poplar Street the estimated expense was only $93,000.

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[3] The Poplar Street school is located just south and west of the intersection of I-40 and I-30. It is very near the Ole Main High School. *See* n.2, *supra*.

[4] The sub-totals of the operation and maintenance expenses were broken down as follows:

	Jones	Poplar Street
Maintenance Repairs 1980-81	$17,614	$17,125*
Annual Electric and Gas Costs	28,000	18,000
Security – Annual	3,204	864
Custodians	72,000	40,000
Totals	$120,818	$75,989

* Includes $5,000 paving expense, a non-recurring cost for next ten years.

Superintendent Miller also produced a report which compared the number of white and black students that would be transported if five schools were used for seventh through ninth grades with the number bused if Jones was closed. This report stated that 120 more blacks and 93 more whites were transported if the Jones School closing was approved.[5] Further, Superintendent Miller testified that the closing of Jones would save the District $340,000. He stated that this amount came from a reduction in costs of "staff, supplies, equipment and utilities." Miller was not able to provide details to support this claimed savings nor was he able to produce figures on how much would be realized if one of the other junior high buildings was closed.

III. DISCUSSION

It is beyond debate that the burden of desegregation should be shared as equally as possible between blacks and whites, *Davis v. Board of Education*, *supra*, 635 F.2d at 731-32; *Clark v. Board of Education*, 449 F.2d 493, 496, 499 (8th Cir. 1971) (en banc), *cert. denied*, 405 U.S. 936 (1972), and that any part or revision of a desegregation plan should be judged on the basis of whether it contributed to the establishment of a unitary system of education. *See Milliken v. Bradley*, 433 U.S. 267, 279-82 (1977).

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[5] The total number of students in the North Little Rock school system is approximately 10,000. Blacks represent about 31% of this total.

The application of these general principles is more difficult than merely stating them. The Tenth Circuit has listed the following factors which should be evaluated in such cases:

> (1) the existence of valid nonracial educational reasons for closing school facilities located in predominantly black areas; (2) the condition and adequacy of the facilities at the school being closed; (3) whether the facilities to which the minority students were being transferred were adequate and whether the transfer would cause those facilities to be "overtaxed"; (4) whether the primary or sole reason for the school board's action was the fear that less constitutionally suspect solutions to segregation would lead to "white flight" from the school district; (5) whether the entire or primary burden of integration is placed on black students and teachers; and (6) whether the school board considered alternatives which did not require the closure of predominantly black schools before making a final decision. * * * No one of these factors, standing alone, is necessarily determinative.

Fitzpatrick v. Board of Education, 578 F.2d 858, 861-62 (10th Cir. 1978) (citations omitted). We would add to this list that economic, as well as educational reasons, should be considered but that financial considerations cannot be dispositive.

Reviewing the factors which are relevant in this case demonstrates that there are valid nonracial reasons for the closing of Jones. The declining enrollment and decreased funding made closing of one of the five schools a prudent action to take. The decision to select a centrally located school is likewise supportable for nonracial reasons. Because the seventh grade center serves all the seventh graders in the district, a central location is a logical method to reduce transportation time and costs.

The projected expense at Jones for repairs in the next five years suggests that the condition of Jones is less attractive than Poplar Street. There is no evidence in the record to suggest that Poplar Street will be overtaxed by this shift of students. Further, the burden of integration will not be substantially altered from the original desegregation plan as approved by this court in 1971. Testimony at the hearing also demonstrates that the School Board considered an alternative which did not require the closing of a predominantly black school. Initially the administration considered closing each of the five junior highs but eventually narrowed the selection to the two centrally located schools. In sum, this decision to close Jones apparently represents a substantial financial savings while meaning only a slight, if any, increased burden on black children. It was not an abuse of discretion for the district court to approve this decision.

It is somewhat misleading to state that the problem in this case concerns the closing of a "black" school. While Jones is in a predominantly black neighborhood and prior to desegregation it was an all-black school, since 1971 it has served as the school for all the seventh graders in the district. In the 1980-81 school year, for example, 561 white students compared with 221 black students attended Jones. Thus, it was a school for both black and white students for the last ten years. The real problem here is that the children in the black neighborhood surrounding Jones will lose a walk-in neighborhood school. Our opinion in this case should not be interpreted as minimizing this interest. Nor should it be thought that school districts, many of which will face similar problems of declining enrollments and monies, can close schools with impunity.

In school districts where a finding of de jure discrimination has been made and a desegregation plan is in effect the burden is upon the district to demonstrate that the motivation for the school closing is not racial. *See Haney v. County Board of Education*, 429 F.2d 364, 372 (8th Cir.

1970). This should be done through the use of objective evidence to show the need for the proposed closing, what other alternatives were considered and why they were rejected.

In the case at bar this test has been substantially satisfied. The additional transportational burden caused by the closing of Jones is minor and the basic elements of the plan approved in 1971 remain intact. [6]

> The racial makeup of the three eighth-ninth grade junior high schools in new attendance zones drawn and approved by the Board would be as follows:
>
> | | | |
> |---|---|---|
> | Ridgeroad | | |
> | | white 450 | |
> | | black 176 | |
> | | 626 | 28.1 percent minority |
> | Lakewood | | |
> | | white 374 | |
> | | black 169 | |
> | | 543 | 31.1 percent minority |
> | Rose City | | |
> | | white 284 | |
> | | black 157 | |
> | | 441 | 35.6 percent minority |
>
> Since the racial makeup of the district is approximately 70% white and 30% black, the plan fully comports with prior decisions of the District Court and the Court of Appeals in the instant case.

Davis v. Board of Educ., slip op. at 1-2, No. LR-68-C-151 (E.D. Ark. August 7, 1981).

The defendant School Board also raises the related issues of standing and whether the suit should be dismissed

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[6] The district court wrote:

because it does not present a "case or controversy" within the meaning of Article III.

Concerning standing the School Board stresses that the plaintiff-intervenor Joshua, who was allowed to intervene in 1977, does not have children in the seventh, eighth, or ninth grades and thus does not have standing regarding the issue before the court because only those three grades are affected. This argument is without merit. The record indicates that Joshua has three children in the North Little Rock school system; in second, fifth and tenth grades. Just as the original plaintiffs in this case were not required to have children in every grade, the present plaintiff need not have children in the specific grades which are at issue in this case. It is enough that Joshua has children in the school system. This motion by the School Board is not a separate lawsuit but is part of the continuing process to establish a completely unitary system of public education in North Little Rock. Our two earlier opinions clearly stated that the district court was to "retain jurisdiction until such time as the North Little Rock School District is thoroughly integrated." *Davis v. Board of Education, supra*, 635 F.2d at 733. *See Davis v. Board of Education, supra*, 449 F.2d at 502. Thus, the issue is not whether Joshua has standing with regard to the seventh, eighth and ninth graders which the closing of Jones will have an impact upon but whether she, on behalf of her children, has standing with regard to the entire desegregation suit concerning the North Little Rock school system. We think it is clear that she does.

The School Board further maintains that no case or controversy exists because no class has been certified and because the case has been moot since the desegregation plan was implemented in 1972. They rely upon Justice Rehnquist's dissent to the United States Supreme Court denial of certiorari in the last appeal before this court. *Davis v. Board of Education*, 50 U.S.L.W. 3272 (1981). It is

our view that the requirements of Article III are satisfied. The district court has been instructed to maintain jurisdiction until full integration is achieved. The School Board, pursuant to this directive, has sought permission of the district court before implementing major changes in school facilities or programs. For example, in 1976, the school board sought approval to renovate two elementary school buildings and another building at one of the high schools. The initial motion in this case is another example of the court's continuing jurisdiction over desegregation of the North Little Rock schools. This case should not be dismissed and a case or controversy sufficient to satisfy Article III will exist until such time as the district court determines that a unitary system of education has been achieved and the North Little Rock School District is thoroughly integrated.

As the Fifth Circuit has stated, "a school system is not automatically desegrated when a constitutionally acceptable plan is adopted and implemented." *United States v. Texas Education Agency*, 647 F.2d 504, 508 (5th Cir. 1981). *See Pate v. Dade County School Board*, 588 F.2d 501, 504 (5th Cir.) (per curiam), *cert denied*, 444 U.S. 835 (1979), ("[we have recognized] that the district court has a continuing responsibility to appraise the system in the light of actual conditions and experience and make required changes to assure the maintenance of a unitary system"); *Thompson v. Madison County Board of Education*, 496 F 2d 682 686-87 (5th Cir. 1974).

Affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

Robert J. DAVIS, et al., Plaintiffs,

v.

BOARD OF EDUCATION OF the NORTH LITTLE ROCK, ARKANSAS, SCHOOL DISTRICT, a Public Body Corporate, and F.B. Wright, Superintendent of the Schools of the North Little Rock School District, Defendants,

Lorene Joshua, Intervenor.

No. LR-68-C-151.

United States District Court, E.D. Arkansas, W.D.

August 7, 1981.

On Application for Stay Aug. 17, 1981.

John Walker, Little Rock, Ark., for plaintiffs.

Robert V. Light, Little Rock, Ark., for defendants.

ORDER

WOODS, District Judge.

On May 22, 1981 the defendants filed a motion for approval of a plan adopted by the North Little Rock Board of Education to close the Seventh Grade Center operated at Central Junior High School (formerly Jones). The Board stated that because of a significant decline in enrollment and other factors, it is no longer feasible economically or educationally to operate the Central School, which all seventh grade students had attended during the 1980-81 school year. Under the proposed plan the present Junior High Schools of Ridgeroad, Lakewood and Rose City would

be organized as eighth-ninth grade schools with the Poplar Street School site being used for all seventh graders. The racial makeup of the three eighth-ninth grade junior high schools in new attendance zones drawn and approved by the Board would be as follows:

Ridgeroad		
	white 450	
	black 176	
	626	28.1 percent minority
Lakewood		
	white 374	
	black 169	
	543	31.1 percent minority
Rose City		
	white 284	
	black 157	
	441	35.6 percent minority

Since the racial makeup of the district is approximately 70% white and 30% black, the plan fully comports with prior decisions of the District Court and the Court of Appeals in the instant case.

[1] Opposition to the motion was filed by the intervenor Mrs. Lorene Joshua on the basis that closing Central would impact more severely on black students, since a greater number of them would have to be bused in comparison to whites. While serious questions have been raised as to the intervenor's standing to attack the proposed plan, since none of her three children are seventh graders, we find standing on the basis of the fact that three of her children are in the North Little Rock School District. We also reject intervenor's contention that the Court does not have jurisdiction to decide this motion and proceed to decide the case on the merits. In addition to the motion and response thereto, briefs were filed by the parties and testimony was taken on August 5, 1981.

[2] Superintendent of Schools George Miller, Assistant Superintendent Andrew Power and President of the Board of Education George Stancil all testified in support of the motion. Both of the latter are black. Only the intervenor testified in opposition to the motion, and her testimony was limited to the issue of her standing to contest the motion. The testimony of the movants amply supported their position that the District is faced with a budget reduction of $1,150,000; that the closing of Central would save the district approximately $340,000; that the Poplar Street facility is a more desirable site from the standpoint of physical facilities and location, and that it would require less maintenance and security costs. While it is true that slightly more blacks than whites (120 against 93) would be bused in the 1980-81 school year, we do not regard these figures as significant or unduly impacting upon the black children. As a matter of fact, in order to maintain a racially balanced school system in North Little Rock, busing must inevitably impact more severely on black students, who are concentrated to a large extent in certain areas of the school district.

The motion of the defendants is granted.

ON APPLICATION FOR STAY

[3] The intervenor, Mrs. Lorene Joshua, has applied for a stay of the Order this court entered on August 7, 1981, granting permission to the North Little Rock Board of Education to close Central Junior High School. The stay is denied for the following reasons *inter alia*:

1. The North Little Rock Board of Education needs to make immediate plans for the 1981-82 school year.

2. The notice seeking approval of the proposal to close Central Junior High School was filed in this court on May 22, 1981.

3. No response was made to this motion until intervenor's attorney wrote a letter dated June 19, 1981 (received several days later) in which the jurisdiction of this court was attacked. The jurisdiction argument was patently without merit, and on July 2, 1981 the Court wrote Mr. Walker and gave him ten (10) days to respond to the motion in spite of the fact that a response thereto was long overdue, as it was due ten (10) days after its service on May 22, 1981. Local Rule 20(b).

4. On July 13, 1981 Mr. Walker filed a pleading denominated "Opposition to School Closing," and the matter was set for hearing and the taking of testimony on August 5, 1981.

5. On the morning of August 4, 1981, a letter on Mr. Walker's letterhead and signed by Mr. John Sizemore, one of Mr. Walker's associates, was hand-delivered to the Court. The letter stated as follows: "This will also confirm that the plaintiffs are withdrawing, for the time being, their opposition to the defendants' motion to close the Seventh Grade Center." (Court Exh. 1) The letter designated a copy to Mr. Robert Light, attorney for the defendants. Mr. Light stated in open court that the letter was also hand-delivered to him on the morning of August 4, 1981.

6. In the early afternoon of August 4, 1981, Mr. Walker called me from Dallas, Texas and stated that his associate Mr. Sizemore had no authority to write the letter mentioned in (5), *supra*; that he was withdrawing the letter; that he wanted the hearing to proceed as scheduled. Although this request was unusual and unprecedented in my experience, in view of the effect on the public of a school closing, the Court advised Mr. Walker that the hearing would be reinstated for the next day, if Mr. Light had not released his witnesses (which he had done). Mr. Light, however, advised the Court that if the hearing could be postponed until 1:00 p.m., he could recontact his witnesses. This was done, and the hearing was reinstated, at some in-

convenience to both the Court and defendants' counsel, on August 5, 1981.

7. At the hearing not one witness testified in opposition to the closing of the school. Mr. Walker's only witness testified as to her standing to sue. This was highly dubious, since she had no children in the single grade affected by the closing. However, the Court found standing based on the fact that she had other children in the District. It is significant that, when the proposal was discussed and adopted at a public meeting of the North Little Rock Board of Education, the only person to appear in opposition was Mr. Walker.

8. In contrast to the absence of witnesses opposing the Board's proposal, the Superintendent of the North Little Rock School District, the Assistant Superintendent, and the President of the North Little Rock Board of Education testified in support of the proposal at the August 5th hearing. Both of the latter are black.

9. The Court specifically finds that, on the record made before it, there is very little likelihood that the plaintiff-intervenor would prevail by virtue of an appeal.

10. The Court further finds that the movant, Mrs. Joshua, would not be harmed by refusal of this stay during appeal because she has no children in the affected grade.

11. The Court further finds that, if a stay is granted, the North Little Rock School District will be seriously harmed in terms of substantial added costs to the taxpayers of the district and in terms of proper planning for the ensuing school year.

12. In summary, the Court finds that the public interest would not be served by a stay of this Court's order of August 7, 1981 but would be seriously harmed.

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 81-1875 September Term, 1981

Robert J. Davis, et al,

Appellants,

vs.

Board of Education of the North Little Rock, Arkansas, School District, etc., et al,

Appellees.

This appeal from the United States District Court for the Eastern District of Arkansas was considered on a designated record from the United States District Court and on briefs of the respective parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, affirmed in accordance with the opinion this Court.

March 23, 1982

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No. 81-2316

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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THE BOARD OF EDUCATION OF THE NORTH LITTLE ROCK, ARKANSAS, SCHOOL DISTRICT, et al.,

Petitioners,

v.

ROBERT J. DAVIS and LORENE JOSHUA,

Respondents.

==========

On Petition for a Writ of Certiorari to The United States Court of Appeals For The Eighth Circuit

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BRIEF IN OPPOSITION

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STATEMENT

The Current Proceedings

The most recent proceedings in this school desegregation case involving the public schools of North Little Rock,

Arkansas were initiated by the school board's motion to revise the court approved desegregation plan to enable the board to close one of its schools. Over respondents' objections, both courts below upheld the board's right to make the requested changes on the merits, while rejecting the board's arguments that respondent had no standing to contest the modification of the court approved desegregation plan and that unitary status had been achieved when the desegregation plan was initially implemented in 1972. Respondent has not sought review of the unfavorable decision below.

Thus the case presents the anomalous situation of a school board, the successful party below, seeking review of a decision which ruled in the board's favor on the merits.

The petition presently before this Court stems from a motion filed on May 22, 1981 by the board seeking approval of a plan to close a district-wide seventh grade center at formerly black Central Junior High School. Plaintiff-intervenor Lorene Joshua unsuccessfully opposed this motion on the grounds that the proposed closing would impose disproportionate transportation burdens on black students and continue an illegal policy of discriminatorily closing educational facilities in black areas. The board also reiterated arguments made previously that Mrs. Joshua[1/] lacked standing to contest the closing of the seventh

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1/ The action was originally filed by Cornell Graves as a class action pursuant to Fed. R. Civ. P. 23(a) and (b)(2). Although a class has never formally been certified the courts below have treated this litigation as a class action. The district court and the court of appeals have permitted liberal substitution of plaintiffs. Cf. Rogers v. Paul, 382 U.S. 198 (1965). On

grade center because none of her children attended that grade in 1981 and that unitary status in effect had been achieved long ago so that judicial supervision was unnecessary. The district court found it sufficient that she currently had three children in the school system, in the second, fifth and tenth grades. Continuing jurisdiction was found. Plaintiff-intervenor Joshua appealed the closing of the center.

The Court of Appeals affirmed. The court also stated that it clear that plaintiff had standing "with regard to the entire desegregation suit" and that there

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1/ continued

April 22, 1977, the district court allowed Lorene Joshua, as mother and next friend of four children enrolled in the North Little Rock public schools, to be substituted for Robert J. Davis, who had moved away from North Little Rock. Davis had succeeded Graves, whose children had earlier graduated from the system.

was no need for pupils in each grade level to be plaintiffs. The court found that a case or controversy sufficient to satisfy the Article III requirement continued to exist until the district court determined that a unitary system of education had been achieved in compliance with the prior court orders.

The Prior History of the Case

The board filed a petition for certiorari raising the same questions in 1981, No. 80-1831, and this Court denied it on October 13, 1981. 50 U.S.L.W. 3272. Because the case involves an effort to relitigate matters previously decided in earlier proceedings we set forth below a brief history of the case.

This desegregation action was initiated in 1968 by black students and their parents. In 1969 the district court

enjoined the board from further maintaining its unconstitutional dual school system and ordered relief. Graves v. Board of Education of North Little Rock, Arkansas, School District, 299 F. Supp. 843 (E.D. Ark. 1969).[2/] In 1971, the Eighth Circuit ordered implementation during the 1972-73 school year of a plan which would desegregate schools, faculty and staff. Davis v. Board of Education of North Little

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2/ This litigation has produced five reported opinions in the district court, three in the court of appeals, and one denial of a petition for certiorari in this Court: Graves v. Board of Education of North Little Rock, Arkansas, School District, 299 F. Supp. 843 (E.D. Ark. 1969); 302 F. Supp. 136 (E.D. Ark. 1969); Davis v. Board of Education of North Little Rock, Arkansas, School District, 328 F. Supp. 1197 (E.D. Ark. 1971); 449 F.2d 500 (8th Cir. 1971) (en banc); 362 F. Supp. 730 (E.D. Ark. 1973); 635 F.2d 730 (8th Cir. 1980), cert. denied, 50 U.S.L.W. 3272 (1981) (Rhenquist, J. dissenting); 520 F. Supp. 108 (E.D. Ark. 1981); 674 F.2d 684 (8th Cir. 1982).

Rock, 449 F.2d 500 (8th Cir. 1971) (en banc). The district court retained jurisdiction.

On April 30, 1975 plaintiffs moved for further relief, seeking, inter alia, further faculty and staff desegregation and a reduction in the burden of transportation imposed upon black students. The district court ruled in favor of plaintiffs on September 13, 1977 after permitting Mrs. Joshua's intervention, but the presiding judge died before ruling on motions by the board to vacate all prior decrees and orders of the district court on jurisdictional grounds. The district court eventually denied the Board's motions on June 29, 1979. On appeal, the Eighth Circuit affirmed the district court's decision without dissent. Davis v. Board of Education of North Little Rock, Arkansas, 635 F.2d 730 (1980).

With regard to faculty and staff, the Court of Appeals upheld the district court's finding that the school district had not eradicated all vestiges of discrimination and that "[m]ore remains to be accomplished before it can be said that the North Little Rock School District is fully integrated." 635 F.2d at 733. The court also found that "the record is replete with evidence of racial disparities" in extracurricular activities and disciplinary suspensions, which "can be dramatically improved if this Court's earlier mandate, requiring a nonracially identifiable faculty and staff at every level of the school system is promptly implemented." 635 F.2d at 733. The court remanded the case to the district court with orders to "retain jurisdiction until such time as the North Little Rock School District is thoroughly integrated." Id.

The board's petition for certiorari to this Court, which raised the same questions as the board seeks to present by its present petition, was denied. Board of Education of North Little Rock, Arkansas, School District v. Davis, 50 U.S.L.W. 3272 (1981) (Rhenquist, J., dissenting).

REASONS TO DENY THE WRIT

1. Last term, this Court denied certiorari to review the same questions presented in the instant petition.[3/] The

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3/ The questions presented in the petition in 80-1831 were:

(1) Does Constitution vest district court with jurisdiction to continue its supervision of a school district's continued operations, including imposition of mandatory cross-district busing and manipulation of school assignments to achieve racial balance where district has operated court-approved racially unitary school system since 1972?

record reveals that since then the board has presented no new factual evidence in support of its contentions or attempted to show material change of circumstances: the record on the failure to achieve unitary status in 1972 and Mrs. Joshua's standing is exactly the same as when this case was last before the Court. Below, the board merely reargued questions previously and conclusively decided against it by the two lower courts. Nor does the instant petition make any argument in behalf of review not previously made in the previous petition.

3/ continued

(2) Is district court at liberty to treat suit filed in 1968 but never certified under Fed. R. Civ. P. 23 as class action in order to sustain its continued supervision of operation of school district and to summarily substitute new nominal plaintiffs from time to time to perpetuate its jurisdiction in response to claim of mootness for lack of any plaintiff with stake in its outcome?

Thus, there simply is no reason for the Court to reconsider its prior denial of the writ.

2. Petitioner was the prevailing party below on the matters actually litigated and seeks no change in the results obtained below as to those matters. Petitioner seeks only a change in the legal theory of the decisions below in order to affect the disposition of matters other than those actually considered by the courts below.

3. With respect to the merits of the ruling of the two courts below on the achievement of unitary statute and standing, we refer the Court to the brief in opposition filed in No. 80-1831. However, we note that there was no abuse of equitable discretion by the courts below in ruling that the board has failed to attain unitary status. The board has not sought

an evidentiary hearing much less demonstrated that mere initial implementation of the desegregation plan in the 1972-73 school year resulted in a full transition to a racially nondiscriminatory school system. The rule is that the efficacy of a desegregation remedy must be proved in practice.[4/] As late as 1980, the Court of Appeals, referring specifically to faculty and staff segregation and utilization of facilities, stated that "[m]ore remains to be accomplished before it can be said that the North Little Rock School District is fully integrated." 635 F.2d at 733.[5/]

4/ E.g., Raney v. Board of Education, 391 U.S. 443, 449 (1968); Green v. School Board of New Kent County, 391 U.S. 430, 439 (1968); see also United States v. Texas Education Agency, 647 F.2d 504, 508-09 (5th Cir. 1981).

5/ The Court has repeatedly ruled that faculty and staff assignment and utilization of facilities present issues which

In its most recent opinion, the Eighth Circuit expressly recognized the need for the court's "continuing jurisdiction over desegregation" and that "[t]his case should not be dismissed and a case or controversy sufficient to satisfy Article III will exist until such time as the district court determines that a unitary system of education has been achieved and the North Little Rock School District is thoroughly integrated." 674 F.2d at 689.[6/]

5/ continued

properly fall within the scope of a desegregation case. Columbus Board of Education v. Penick, 443 U.S. 449, 460 (1979); Keyes v. School District No. 1, 413 U.S. 189, 200 (1973); Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 18 (1971).

6/ Absent an evidentiary hearing on the attainment of unitary status, the established practice is that the district court should maintain jurisdiction of a school

As to standing, it has long been the rule that each individual minority student has a right to attend fully nondiscriminatory schools and standing to challenge particular aspects of a racially segregated school system. E.g., Rogers v. Paul, 382 U.S. 198, 200 (1965); Flax v. Potts, 313 F.2d 284, 288-89 (5th Cir. 1963). Petitioner relies on Pasadena City Board of Education v. Spangler, 427 U.S. 424, 429-30 (1976). In that case, plaintiffs had graduated from the school system and only the intervention of the United States kept the litigation from becoming moot. The instant case is distinguishable

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desegregation case. E.g., Lee v. Macon County Board of Education, 584 F.2d 78, 81 (5th Cir. 1978); United States v. State of Texas, 509 F.2d 192, 193 (5th Cir. 1975); Youngblood v. Board of Public Instruction, 448 F.2d 770 (5th Cir. 1971).

from Pasadena in that the district court allowed Mrs. Joshua, a plaintiff-intervenor with a live interest in the controversy, to intervene over five years ago.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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